FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
GENERAL EXCAVATOR COMPANY,
Respondent.
No. 84.

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
GENERAL EXCAVATOR COMPANY,
Respondent.
No. 85.

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
THE OSGOOD COMPANY,
Respondent.
No. 86.

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
THE OSGOOD COMPANY,
Respondent.
No. 87.

MOTION TO RECALL AND CORRECT MANDATES, AND BRIEF IN SUPPORT THEREOF.

EDWIN P. CORBETT,
LLOYD T. WILLIAMS,
EDWARD L. REED,
JOHN J. MAHONEY,
Counsel for Respondents.

WADE H. ELLIS,
CHALLEN B. ELLIS,
Of Counsel.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

KEYSTONE DRILLER COMPANY, Petitioner,
vs.
GENERAL EXCAVATOR COMPANY, Respondent. } No. 34.

KEYSTONE DRILLER COMPANY, Petitioner,
vs.
GENERAL EXCAVATOR COMPANY, Respondent. } No. 35.

KEYSTONE DRILLER COMPANY, Petitioner,
vs.
THE OSGOOD COMPANY, Respondent. } No. 36.

KEYSTONE DRILLER COMPANY, Petitioner,
vs.
THE OSGOOD COMPANY, Respondent. } No. 37.

MOTION TO RECALL AND CORRECT MANDATES.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Now come the respondents in the above entitled causes, by their attorneys, and move this Honorable Court to recall the mandates issued herein on the 5th day of

January, 1934, to the Honorable Judges of the District Court of the United States for the Northern District of Ohio, because they do not conform to the Opinion rendered by this Court on December 4, 1933,* in that they direct dismissal of the bills of complaint "without prejudice", whereas the decision of this Court was that because of "unclean hands", complainant, Keystone Driller Company, was not entitled to any relief in equity, which means "with prejudice". Respondents therefore respectfully submit that the mandates should have directed the dismissal of the bills of complaint generally, or "without prejudice to suits at law", but no more.

Wherefore, respondents pray that said mandates be recalled and amended in this respect, and then be returned to the District Court of the United States for the Northern District of Ohio, for execution.

Respectfully submitted,

EDWIN P. CORBETT,
LLOYD T. WILLIAMS,
EDWARD L. REED,
JOHN J. MAHONEY,
Counsel for Respondents.

WADE H. ELLIS,
CHALLEN B. ELLIS,
Of Counsel.

*Keystone Driller Co. v. General Excavator Co. et al., 78 U. S. 202, (Law Ed. advance Opinions).

IN THE SUPREME COURT OF THE UNITED STATES.

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KEYSTONE DRILLER COMPANY, Petitioner, vs. THE OSGOOD COMPANY, Respondent. — No. 37.

BRIEF IN SUPPORT OF MOTION TO RECALL AND CORRECT MANDATES.

On December 4, 1933,[1] this Court affirmed the decision of the Circuit Court of Appeals for the Sixth Circuit,[2] in dismissing the bills of complaint in the above en-

[1] Keystone Driller Co. v. General Excavator Co. et al., 78 U. S. 202, (Law Ed. advance Opinions).

[2] General Excavator Co. v. Keystone Driller Co., 62 F. (2d) 48. On rehearing, 64 F. (2d) 39.

titled causes, because the petitioner, Keystone Driller Company, did not come into equity with "clean hands".

On January 5, 1934, this Court issued mandates to the Honorable Judges of the District Court for the Northern District of Ohio in the above entitled causes. The decrees of the United States Circuit Court of Appeals for the Sixth Circuit having been affirmed, this Court copied into its mandates the said decrees of the said United States Circuit Court of Appeals for the Sixth Circuit which read as follows:

> "This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.
>
> On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby reversed and the cause remanded with instructions to dismiss bill of complaint without prejudice. Costs are taxed against the Keystone Driller Company."

It is submitted that the portions of the mandates which recite the decrees of the Circuit Court of Appeals, directing the dismissal of the bills of complaint "without prejudice", are incorrect, and are not in conformity with the Opinion of this Court, rendered December 4, 1933.

The Opinion of this Court and the Opinions of the Circuit Court of Appeals for the Sixth Circuit, which the Opinion of this Court affirmed, were reached after a full hearing of the above entitled causes upon the merits, and

decided that the petitioner, the Keystone Driller Company, was not entitled to any relief in equity with respect to any cause of action in these cases.

Under such circumstances, the decrees of the Circuit Court of Appeals and the mandates issued by this Honorable Court on January 5, 1934 should have directed merely the dismissal of the bills of complaint, omitting the words "without prejudice", or stating that the dismissal of the bills of complaint to be "without prejudice to suits at law", but no more.

In Lake St. El. R. Co. v. Ziegler, 99 F. R. 114, at page 125, the Circuit Court of Appeals for the Seventh Circuit had before it a decree of a lower court dismissing a bill "without prejudice" where there had been a full hearing upon the merits. The Court reversed the lower court, stating as follows:

> "This conclusion brings us to the questions presented upon the merits of the case. We are not advised by the records of the considerations which led the court below to dismiss the bill without prejudice to the right of the complainant to assert, in the foreclosure suit brought by one of the trustees to foreclose the trust deed, by answer or cross bill, the matters alleged in the present bill. It is manifest that neither party desired such disposition of the case, since both have appealed from the decree. **Both parties had presented to the court, by pleadings and by proofs, their respective claims, and a full hearing was had. There would seem to be no good reason to remand the parties against the wishes of each to further litigation, or why the matter in dispute should not have here final determination upon the merits.**" (Boldface ours.)

In Freeman on Judgments, (Fifth Edition), Sec. 760, page 1602, at page 1604, it is stated:

> "A decree dismissing a bill for want of equity is a final and conclusive adjudication, and bars a subsequent suit in equity though not necessarily an action at law."

This Court, in Reinman v. City of Little Rock, 237 U. S. 171, 59 L. Ed. 900, at page 904, stated as follows:

> "But it seems that in the practice of the courts of Arkansas, as elsewhere, the expression 'dismissed for want of equity' is employed to indicate a decision upon the merits, as distinguished from one based upon a formal defect or default; and that it applies as well where on final hearing it is found that the averments of the complaint are not true in fact, as where those averments do not upon their face show a sufficient basis of fact for the granting of the relief sought."

In Foss v. People's Gaslight & Coke Co., 293 Ill. 94, 127 N. E. 347, at page 349, the court held:

> "Laches is a defense which may be taken advantage of by demurrer, if it appears on the face of the bill, or a defendant may claim the benefit of it by his answer. In this case the laches appeared on the face of the bill, and the general demurrer went to the merits of that defense. The court sustained the defense and dismissed the bill on the merits for want of equity. As in the case of the Marie Church, if the defendant had answered, and the bill had been dismissed after a hearing, in which the facts alleged were proved, it would not be thought that the decision was not on the merits."
>
> (Decree below, dismissing bill for want of equity, affirmed).

In cases where the maxim of "unclean hands" has been held to apply, the courts have uniformly decreed the dismissal of the bills of complaint generally, or sometimes "without prejudice to actions at law", but no more. This practice, in the Federal Courts, is illustrated by the following cases:

Deweese v. Reinhard, 165 U. S. 386, 390, 17 S. Ct. 340, 341; 41 L. Ed. 757.
Bein v. Heath, 6 How. 228; 12 L. Ed. 416.
Manhattan Medicine Co. v. Wood, 108 U. S. 218; 27 L. Ed. 706.
Wheeler v. Sage, 1 Wall, 518; 68 U. S. 518; 17 L. Ed. 646.
Pope v. Gormully, 144 U. S. 224, 236, 237; 36 L. Ed. 414.
Weeghman v. Killifer, 215 F. 289, (C. C. A. 6th).
California Fig. v. Stearns, 73 F. 812 (C. C. A. 6th) (approved by the Supreme Court in Worden v. California Fig. Co., 187 U. S. 516).
Memphis Keeley Institute v. Leslie E. Keeley Co., 155 F. 964 (C. C. A. 6th).
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Gerosa v. Apco Mfg. Co. (C. C. A. 1st) 299 F. 19.
Stone & McCarrick Inc. v. Dugan Piano Co., et al. (C. C. A. 5th) 220 F. 837.

A dismissal "without prejudice" leaves the parties free to file suits in equity. The entry of such a decree in this case would work a great injustice on the respondents, because it would enable the petitioner, the Keystone Driller Company, to escape from the consequences

of its inequitable conduct by filing new bills of complaint in equity to obtain equitable relief, to which this Court in its Opinion, dated December 4, 1933, held it was not entitled. This, of course, was not the intention of this Honorable Court.

The decision of this Court was on the merits, and therefore "with prejudice" against the petitioner, the Keystone Driller Company. These respondents have spent many thousands of dollars in defending these suits. The prior adjudication in the Byers case was obtained by fraud on the part of petitioner, and was fraudulently used by petitioner against these respondents. These respondents are clearly entitled to have the benefit of the decision of this Court in its favor, and should not be compelled by an error in the mandates to contest, at great expense, the same questions all over again.

The decree of the Circuit Court of Appeals dismissing the bills of complaint herein "without prejudice" was undoubtedly due to inadvertence and mistake, and is not in conformity with its own Opinions, denying equitable relief to the petitioner, nor with the Opinion of this court, rendered December 4, 1933.

For the above reasons, it is therefore respectfully submitted that the mandates issued by this Court in the above entitled causes on January 5, 1934, should be recalled, and corrected by directing the dismissal of the

bills of complaint generally, or "without prejudice to suits at law", but no more.

Respectfully submitted,

EDWIN P. CORBETT,
LLOYD T. WILLIAMS,
EDWARD L. REED,
JOHN J. MAHONEY,
Counsel for Respondents.

WADE H. ELLIS,
CHALLEN B. ELLIS,
Of Counsel.